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and

U.S. Court of International Trade

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This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

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United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

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R. Kenton Musgrave
Richard W. Goldberg

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Clerk

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Decisions of the United States Court of International Trade

(Slip Op. 93–212)

PUBLIC VERSION

UNITED STEELWORKERS OF AMERICA, AFL-CIO.CLC AND UNITED STEELWORKERS OF AMERICA, LOCAL UNION NO. 5089, PLAINTIFFS *v.* U.S. SECRETARY OF LABOR, DEFENDANT

Court No. 91–12–00855

[Department of Labor's determination denying certification of eligibility for trade adjustment assistance is affirmed.]

(Decided November 9, 1993)

United Steelworkers of America (Rudolph L. Milasich, Jr.) for plaintiffs.

Frank W. Hunger, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Marc E. Montalbine)*, United States Department of Labor *(Annaliese Impink)*, of counsel, for defendant.

MEMORANDUM OPINION

DICARLO, *Chief Judge:* Plaintiffs, United Steelworkers of America, AFL-CIO.CLC and United Steelworkers of America, Local Union No. 5089, brought this action for judgment upon the agency record pursuant to Rule 56.1 of the Rules of this Court. Plaintiffs challenge the Department of Labor's denial of certification for trade adjustment assistance to employees of Sunshine Mining Company, Kellogg, Idaho. The court has jurisdiction pursuant to 19 U.S.C. § 2395 (1988) and 28 U.S.C. § 1581(d)(1) (1988). The court affirms Labor's determination.

BACKGROUND

Sunshine Mining Company is a producer of silver, copper and antimony. Approximately 90% of its sales is silver and 10% is copper and antimony. Sales of silver declined in 1990 compared to 1989, and sales of silver, copper and antimony declined during the first quarter of 1991 compared to the first quarter of 1990. In June 1991, Sunshine laid off 269 workers from its silver and copper/antimony mine in Kellogg, Idaho, a subsidiary of Sunshine.

In May 1991, a petition was filed with Labor on behalf of Sunshine's workers for certification of eligibility to apply for trade adjustment assistance under 19 U.S.C. § 2271 *et. seq.* Labor initially denied the petition based on a customer survey, finding that increased imports did not "contribute importantly" to the separation of the workers from Sunshine, as required by 19 U.S.C. § 2272 (1988). *See Determinations*

Regarding Eligibility to Apply for Worker Adjustment Assistance, 56 Fed. Reg. 36,065 (Dep't Labor 1991). Labor subsequently reconsidered its determination. After conducting another customer survey based on an additional list of customers submitted by Sunshine, Labor affirmed its determination. *See Sunshine Mining Co. Kellogg, ID,* 56 Fed. Reg. 54,589 (Dep't Labor 1991). By court order dated June 1, 1992, Labor's determination was remanded to allow plaintiffs to review business confidential information in the administrative record and submit written comments. Labor's remand determination again affirmed its original determination. *Sunshine Mining Company, Kellogg, ID,* 57 Fed. Reg. 48,399 (Dep't Labor 1992) (Remand Determination).

Plaintiffs challenge Labor's finding that imports did not contribute importantly to the separation of Sunshine's employees as unsupported by substantial evidence. Plaintiffs claim that Labor improperly included a non-full production year of the company in the period of investigation. Plaintiffs also claim that Labor's denial of certification to Sunshine's employees is discriminatory and arbitrary since Labor granted certification to the workers of the ASARCO Coeur Unit, an adjacent silver/copper mine. In connection with the discrimination claim, plaintiffs request an access to the confidential record of Labor's certification to the workers at the ASARCO Coeur Unit.

Standard of Review

"A negative determination by the Secretary of Labor denying certification of eligibility for trade adjustment assistance will be upheld if it is supported by substantial evidence on the record and is otherwise in accordance with law." *Former Employees of General Elec. Corp. v. U.S. Dep't of Labor,* 14 CIT 608, 611 (1990) (citations omitted). *See also* 19 U.S.C. § 2395(b) (1988). Substantial evidence has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938)).

Discussion

1. Whether increased imports contributed importantly to the separation of workers:

The Secretary of Labor shall certify a group of workers as eligible to apply for trade adjustment assistance if he determines:

> (1) that a significant number or proportion of the workers in such workers' firm or an appropriate subdivision of the firm have become totally or partially separated, or are threatened to become totally or partially separated,
>
> (2) that sales or production, or both, of such firm or subdivision have decreased absolutely, and
>
> (3) that increases of imports of articles like or directly competitive with articles produced by such workers' firm or an appropriate subdivision thereof *contributed importantly* to such total or

> partial separation, or threat thereof, and to such decline in sales or production.

19 U.S.C. § 2272(a) (emphasis added). The term "contributed importantly" is defined as "a cause which is important but not necessarily more important than any other cause." 19 U.S.C. § 2272(b)(1). "Increased imports" is defined by regulation to mean "that imports have increased either absolutely or relative to domestic production compared to a representative base period." 29 C.F.R. § 90.2 (1992).

In determining whether increased imports contributed importantly to the separation of the workers, Labor often employs a "dual test" which looks to whether the subject company's customers reduced purchases from that company and at the same time increased purchases of competitive imports. While recognizing that this "is not a very sophisticated test," the court found the dual test "a reasonable means of ascertaining a causal link between imports and separations." *United Glass and Ceramic Workers v. Marshall,* 584 F.2d 398, 405–06 (D.C. Cir. 1978). The causal link that Labor must find "suggests a direct and substantial relationship between increased imports and a decline in sales and production." *Estate of Finkel v. Donovan,* 9 CIT 374, 382, 614 F. Supp. 1245, 1251 (1985) (citation omitted).

In this case, Labor conducted customer surveys for the period of 1989, 1990 and the first quarter of 1991. The respondents to the survey include Sunshine, Kellogg's parent company to which the Kellogg mine sent its total production, the single customer that purchased copper and antimony from Sunshine, and three customers that accounted for 60% of Sunshine's silver sales during the investigation period. *Remand Determination,* 57 Fed. Reg. 48,399.

The survey showed that Sunshine itself did not import silver during the investigation period. R. 12. Sunshine's sole customer for copper and antimony increased its purchases from Sunshine and decreased its imports in 1990 compared to 1989, and decreased its purchases both from Sunshine and from imports in the first quarter of 1991 compared to the first quarter of 1990. R. 13. Of the three customers who purchased silver from Sunshine during the period of investigation, one did not have any imports of silver. R. 29. Another reported a constant level of imports and a decrease in purchases from Sunshine. R. 28. And the third increased its purchases from Sunshine and decreased its imports in 1990 compared to 1989, and increased its purchases both from Sunshine and from imports during the first quarter of 1991. R. 31. Based on these survey results, Labor concluded that none of the customers "increased their purchases of imports while decreasing their purchases from Sunshine." *Remand Determination,* 57 Fed. Reg. 48,399.

Plaintiffs contend that although no customer showed, in absolute terms, both increased imports and decreased purchases from Sunshine, customers increased their reliance on imports relative to their purchases from Sunshine during the first quarter of 1991 compared to the first quarter of 1990. Plaintiffs argue that there was a relative increase

of imports by Sunshine's sole customer for copper and antimony, since the decrease in that customer's purchases from Sunshine exceeded, in percentage, the decrease in its imports during the first quarter of 1991.

The relative increase of imports, however, does not in itself establish a causal link with the separation of workers. In order to meet the "contributed importantly" test, Labor must find "a direct and substantial relationship" between the relative increase of imports and the decline in Sunshine's sales and production. *Estate of Finkel v. Donovan,* 9 CIT at 382, 614 F. Supp. at 1251. The record shows that during the first quarter of 1991, Sunshine's sole customer for copper and antimony reduced its purchases from Sunshine as well as from imports and all other domestic sources.[1] R. 13. Compared to the first quarter of 1990, the customer's total purchases of copper and antimony decreased by more than 50 percent. *Id.* In absolute terms, the decrease in its purchases from imports was far greater (about six times more) than the decrease in its purchases from Sunshine. *Id.* Given the evidence that the customer substantially reduced its demand from all sources, it was reasonable for Labor to conclude that the decline in Sunshine's sales and production was not the result of the customer's shift to imports.

Similarly, the record evidence supports Labor's finding that imports had no direct and substantial relationship with the decline in Sunshine's sales of silver. The record shows that the customer who decreased its purchases from Sunshine while maintaining a constant level of imports commented that it "would buy all the silver it could from Sunshine but shifted to other domestic sources because of Sunshine's falling production." R. 28. The only other customer who had imports of silver during the period of investigation increased its purchases from Sunshine. R. 31.

Plaintiffs claim that although this customer increased its purchases from Sunshine, there was a relative increase of imports during the first quarter of 1991 because its imports increased substantially while its purchases from Sunshine increased only slightly. There was, however, no showing of a decline in Sunshine's sales to this customer since the customer increased, rather than decreased, its purchases from Sunshine. *See* 19 U.S.C. § 2272(a)(2) (a group of workers shall be certified as eligible for trade adjustment assistance only if sales or production of the subject company "have decreased absolutely"). Given the statute's focus on the loss of established customers and on the failure to maintain past sales levels, the Secretary of Labor is "well within his discretion in excluding as evidence of the impact of imports those customers who are increasing purchases of imports while maintaining their purchases from [the subject company]." *United Glass,* 584 F.2d at 406.

Plaintiffs further claim that in granting certification to the workers at the neighboring ASARCO mine, Labor found that "U.S. imports

[1] The record indicates that in the first quarter of 1990, the customer purchased [ ] units of copper/antimony from Sunshine, [ ] units from all other domestic sources, and [ ] units from imports; in the first quarter of 1991, it purchased [ ] units from Sunshine, [ ] units from other domestic sources, and [ ] units from imports. R. 13.

of copper * * * and of silver increased absolutely and relative to U.S. shipments in 1990 compared to 1989." Pls.' Br. Ex. 2 (Certification Regarding Eligibility to Apply for Worker Adjustment Assistance, ASARCO – Coeur Unit, Wallace, Idaho, TA–W–25,523, May 3, 1991). According to plaintiffs, this finding was the sole basis of Labor's grant of certification to the ASARCO workers, and in denying certification to the workers at Sunshine, Labor improperly disregarded its own prior finding.

A reading of Labor's ASARCO determination reveals that Labor not only found U.S. imports of copper and silver increased in 1990, but also found specifically that "the ASARCO refinery to which the subject facility sends its production of silver and copper concentrates increased its imports of concentrates in 1990 compared to 1989." *Id.* This specific finding shows that increased imports had "a direct and substantial relationship" with the decline of sales and production at the ASARCO mine.[2] Without establishing this causal link, the increase in the U.S. imports alone would not be sufficient to qualify a group of workers for trade adjustment assistance under the statute. *See* 19 U.S.C. § 2272(a)(3).

In contrast with the ASARCO case, Labor did not find that imports had a direct and substantial relationship with the decline of sales or production in this case. In reaching this conclusion, Labor surveyed 100% of Sunshine's customers for copper and antimony and 60% of its customers for silver. In addition, Labor considered certain government findings on silver production. R. 33 (Department of the Interior: Mineral Commodity Summaries, 1991). These findings indicate that domestic production of silver remained essentially unchanged in 1990 despite a drop in the average price, and that several factors may have contributed to the lower silver price, including a lack of industrial demand, investor fears that the U.S. economy was entering a recession which would limit future increases in industrial demand, the U.S. treasury's disposal of its excess silver holdings, and the use of substitutes for silver in various products. R. 34. The court finds that Labor conducted a reasonable investigation of various factors that may have contributed to the decline of Sunshine's sales and production, and Labor's determination that increased imports did not contribute importantly to the separation of the workers from Sunshine is supported by substantial evidence on the record.

2. The Period of Investigation:

As noted above, Labor's customer survey covers the period of 1989, 1990 and the first quarter of 1991. Plaintiffs claim that it was improper

[2] Plaintiffs assert that the specific finding could not have been the proper basis for Labor's grant of certification to the workers of the ASARCO mine, because the ASARCO refinery is a related party to the ASARCO mine and the court has held that the proper subject of customer survey is the first unrelated purchasers. *See Former Employees of Linden Apparel Corp. v. United States*, 13 CIT 467, 469, 715 F. Supp. 378, 381 (1989). Defendant argues that the ASARCO case is distinguishable from *Linden*. The question of whether Labor conducted a proper investigation in the ASARCO case is not before the court. Nonetheless, it is obvious that if the ASARCO refinery increased imports, the production of the ASARCO mine would be directly affected since the mine sent all its production to the refinery.

for Labor to include the year 1989 in the period of investigation because the Kellogg mine did not reach full production until 1990.

In order to determine whether there was an increase of imports, Labor is directed to use "a representative base period" for comparison, which is defined as "one year consisting of the four quarters immediately preceding the date which is twelve months prior to the date of the petition." 29 C.F.R. § 90.2 (1992). Because the petition in this case was filed on May 9, 1991, the proper base period under the regulation would be the four quarters prior to May 9, 1990. In their supplemental briefings submitted upon request of the court, the parties agree that pursuant to 29 C.F.R. § 90.2 the proper base period in this case should include the last three quarters of 1989 and the first quarter of 1990. The question therefore is whether Labor may consider the data from the first quarter of 1989 in determining whether an increase of imports has occurred.

Although Labor has considerable discretion in conducting its investigations, it is required to comply with its own regulations. By including five quarters in the base period, Labor deviates from the requirement of 29 C.F.R. § 90.2 that a representative base period shall consist of four quarters. The court notes, however, that the purpose of defining a base period under § 90.2 is to determine whether there is an increase of imports. As previously shown, the issue of whether imports increased in this case arises only with respect to the first quarter of 1991 compared to the first quarter of 1990. Consequently, the inclusion of the first quarter of 1989 in the base period had little effect on Labor's finding in this case. Since Labor's determination stands with or without the data from the first quarter of 1989, in the interest of avoiding unnecessary delays, the court will not remand the determination in order for Labor to explain its deviation from the regulation.

3. Access to Confidential Record of the ASARCO Case:

Plaintiffs allege that Labor's denial of certification to Sunshine's workers is arbitrary and discriminatory because Labor granted certification to the workers at the ASARCO mine who were similarly situated as the workers at Sunshine except that the latter are unionized. Crucial to this claim, plaintiffs assert, is an examination of the confidential record of the ASARCO case. According to plaintiffs, the confidential record of the ASARCO case may contain evidence that Labor acted in a discriminatory manner against unionized workers at Sunshine and, without access to the confidential record, they are being deprived of the opportunity to litigate this case adequately.

Plaintiffs are not parties to the ASARCO case. Labor's regulation requires that confidential business information "shall not be available to the public." 19 C.F.R. § 90.32(b) (1992). Such confidential information is also exempted from disclosure by government agencies under the statute. *See* 5 U.S.C. § 552(b) (1988). Plaintiffs have not provided any authority showing that a non-party may be granted access to the confidential information of an unrelated case. Without proper authorization,

Labor may not release the confidential record of the ASARCO case to plaintiffs in this case.

It has been held that Labor's rulings made on the basis of the factual findings must "be in accordance with the statute and not be arbitrary or capricious, and for this purpose the law requires a showing of reasoned analysis." *Former Employees of CSX Oil and Gas Corp. v. United States,* 13 CIT 645, 648–49, 720 F. Supp. 1002, 1006 (1989) (citations omitted). In its remand determination, Labor explained the distinction between the ASARCO case and this case:

> The ASARCO Certification for workers in Wallace, Idaho * * * would not provide a basis for the certification of workers at Sunshine Mining. The ASARCO worker group met all the Group Eligibility Requirements of the Trade Act including the "contributed importantly" test. The findings show that the ASARCO refinery, to which the Wallace mine sent its production of silver and copper concentrates, increased its imports of silver concentrates in 1990 compared to 1989.

Remand Determination, 57 Fed. Reg. 48,399. In contrast, Labor found that the "contributed importantly" test was not met in this case and analyzed the survey results as the basis of its finding. *Id.* Because Labor has provided a reasoned analysis distinguishing its findings in the ASARCO case from those in this case, the court does not find Labor's determination is arbitrary or discriminatory.

CONCLUSIONS

For reasons stated above, the court holds that Labor's determination denying certification of eligibility for trade adjustment assistance to Sunshine's employees is supported by substantial evidence on the record and is in accordance with law.

(Slip Op. 93–213)

PILLSBURY CO., PLAINTIFF *v.* UNITED STATES, MICHAEL LANE, ACTING COMMISSIONER OF CUSTOMS, GARNET J. FEE, REGIONAL COMMISSIONER OF CUSTOMS, NORTH CENTRAL REGION, AND SYLVIA L. PFEFFER, CHIEF, DRAWBACK BRANCH, U.S. CUSTOMS SERVICE, NORTH CENTRAL REGION, DEFENDANTS

Court No. 93–03–00161

(Decided November 10, 1993)

[Plaintiff's renewed motion for preliminary injunction is denied; partial judgment for plaintiff and partial judgment for defendant.]

Neville, Peterson, & Williams (John Peterson, George W. Thompson, Jr., Peter Allen) for plaintiff.

Frank W. Hunger, Assistant Attorney General; David M. Cohen, U.S. Department of Justice, Civil Division, Commercial Litigation Branch *(Jeffrey M. Telep);* of counsel: *Patrice Scully,* U.S. Customs Service, Assistant Regional Counsel, for defendant.

JUDGMENT

MUSGRAVE, *Judge:* On November 5, 1993, the Court heard argument on whether the Commissioner of Customs should be enjoined from effecting revocation by way of a September 28, 1993 letter of plaintiff's Export Summary Procedure ("ESP"), and the "blanket waiver," granted to plaintiff under 19 C.F.R. § 191.141(b)(2)(ii), of the "pre-export notification requirements" for same condition drawback claims filed under 19 U.S.C. § 1313(j).

There was a pre-existing Order in this matter issued by the Court on May 4, 1993, permitting plaintiff to continue to operate under ESP while providing an opportunity for Customs to exercise its plenary right to inspect the specific goods at issue. That Order, in turn, was an attempt to resolve, to the mutual satisfaction of the parties, the issue of how to proceed with exportations of asparagus to Canada by Pillsbury during the 8-week harvest season ending in June for the purposes of potential claims for same condition duty drawback. The May 4, 1993 Order prevented Customs from effecting its original letter dated November 3, 1992, revoking ESP privileges for all products including asparagus, which gave rise to plaintiff's complaint, filed March 16, 1993. At the same time, the Court indirectly gave partial effect to an intervening letter dated April 2, 1993 from the Customs Service which attempted to cure certain overbroad aspects of the November 3, 1992 letter.

In the April 2, 1993 letter, Customs rescinded its revocation of Pillsbury's ESP privileges for products other than asparagus and converted its revocation of those rights for asparagus into a suspension of those rights. This letter was issued without regard for the jurisdiction of this Court, which was seized as of the day of the complaint, *i.e.*, March 16, 1993. Consequently, the Court need not have recognized the April 2, 1993 letter. Nonetheless, the Court saw no harm in giving interlocutory effect to the language contained within regarding rescission of the revocation of all ESP rights for all Pillsbury products. That the rest of the April 2, 1993 letter was not given effect is obvious from the Court's May 4, 1993 Order.

The September 28, 1993 letter, issued without regard for, or leave from the Court, curiously again revokes Pillsbury's ESP privileges for asparagus while at the same time incorporating the Court's May 4, 1993 Order.[1] Additionally, defendant submitted the following comments regarding the September 28, 1993 letter: "Certainly, the September 28, 1993 notice suggests that Customs would not consider the November 3, 1992 [letter] [*sic*] as still having any legal effect. If the November 3, 1992, notice no longer has any legal effect, then, at most, this Court can issue an advisory opinion with respect to it." *Defendant's Response to Order to Show Cause Why Plaintiff's Renewed Application for a Preliminary Injunction be Denied at 33–34.*

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[1] The Court notes with approbation that the Customs Service has included the Court's rulings in its determinations.

If the April 2, 1993 letter and the September 28, 1993 letters are read together, including the latter's incorporation of the Court's May 4, 1993 Order, the defendant appears to have ceded the restrictions of the November 3, 1992 and the April 2, 1993 letter, except as specified in the Court's May 4, 1993 Order. If the combined effect of these letters and the Court's May 4, 1993 Order is to permit Pillsbury to exercise its privileges, albeit under supervision, throughout the harvest and export season, the Court sees little value in revisiting the validity of the November 3, 1992 letter.[2] This is especially true since, as plaintiff asserts, same condition substitution drawback for agricultural products exported from the United States to Canada shall be terminated as of January 1, 1994 by operation of the United States–Canada Free Trade Agreement. *See C.S.D. 93–17, Customs Bulletin and Decisions* (Vol. 27, No. 42, Oct. 20, 1993).[3]

Consequently, the Court believes that Pillsbury will receive all the relief this Court may ultimately grant by ordering that all shipments of asparagus up to September 28, 1993 are governed by the May 4, 1993 Order preserving Pillsbury's ESP privileges subject to inspection and by likewise converting the defendant's rescission of the revocation of ESP privileges regarding all other products into judgment, thereby formally sanctioning restoration of ESP privileges for those products. The Court may not, however, order the Customs Service to ever more refrain from reviewing Pillsbury's ESP privileges.

The portion of the September 28, 1993 notice that purports to revoke ESP while at the same time giving effect to the Court's May 4, 1993 Order is a nullity. On the other hand, the Court determines that the time frame set forth for this litigation in the May 4, 1993 Order and in an accompanying Scheduling Order dated August 9, 1993 was artificial. The proper course of action is to base this interlocutory relief on the period of the harvest, which for convenience shall terminate as of September 28, 1993. Now that Pillsbury has obtained the essence of the relief it sought from this Court, the dispute raised in its complaint is deemed settled.

The Customs Service is thus, as noted above, with regard to any shipments for export subsequent to September 28, 1993, entitled to reassess its position regarding ESP privileges for Pillsbury's products. The Court stresses that this judgment is not a ruling on the fungibility of Pillsbury's imported and exported asparagus; nor is it a ruling on the merits of Pillsbury's potential claims for drawback. This judgment does, however, re-incorporate the filing provisions for asparagus determined in the May 4, 1993 Order covering all exports of asparagus made up to and including September 28, 1993. The relevant provisions of the May 4, 1993 Order state:

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[2] Defendant notes that the Court found some "unspecified" defect in the November 3, 1992 letter. *Defendant's Response* at 26. To clarify, the Court found that to revoke Pillsbury's ESP privileges based on an "ongoing investigation" was not adequate notice under the Customs Service's regulations so that Pillsbury could respond to or rebut the charges in a meaningful way–before the Customs Service or the appellate administrative tribunal. At a minimum, Pillsbury should have been informed of the nature of the investigation and the subject product(s).

[3] Since according to C.S.D. 93–17 substitution same condition drawback will no longer be available for asparagus exported to Canada, the issue in this case is not likely to arise again on these facts.

ORDERED, that Pillsbury shall document its compliance with this Order by providing to officials at the Customs Port Dock or the CES, at the time the exported fresh asparagus is presented for examination, a notice on Customs Form 7539J identifying the merchandise to be exported, the exporting carrier, the place and time of exportation and the ultimate port of destination. The Customs Form 7539J Notice will contain a printed disclaimer indicating the form is not filed as a claim for duty drawback, but rather that: "This document is submitted to Customs solely for the purpose of providing notice of intent to export in accordance with the Order of the United States Court of International Trade in *Pillsbury Company v. United States,* Court No. 93–03–00161. It shall serve only as notice of intent to export, and shall not be considered nor processed as a claim for duty drawback"; and it is further–

ORDERED, that within one year after exportation, or such further period as this Court may by order allow, Pillsbury shall have the option to convert the notice of exportation into a claim for duty drawback by striking the disclaimer, completing all information required on the Customs Form 7539J to complete a claim for drawback, and submitting such additional documentation as may be required to complete the claim; and it is further–

ORDERED, that this Order shall remain in effect for one year from the date it is signed, subject to such extensions as the Court may order upon application of the parties, unless earlier modified or dissolved.

Order of May 4, 1993.

Accordingly, partial judgment is entered for the plaintiff and partial judgment is entered in favor of defendant.

(Slip Op. 93–214)

NAKAJIMA ALL CO., LTD., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND SMITH CORONA CORP., INTERVENOR-DEFENDANT

Court No. 91–12–00853

[Plaintiff's motion for judgment on the agency record denied; action dismissed.]

(Decided November 10, 1993)

Patton, Boggs & Blow (Michael D. Esch and *Ethan S. Burger)* for the plaintiff.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Michael S. Kane);* and *Jeffrey C. Lowe,* U.S. Department of Commerce, of counsel, for the defendant.

Stewart and Stewart (Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr. and *Charles A. St. Charles)* for the intervenor-defendant.

OPINION

AQUILINO, *Judge:* Failure of the International Trade Administration, U.S. Department of Commerce ("ITA") to administer the Trade Agreements Act of 1979, as amended, in the precise manner Congress intended has spawned this action for relief from the *Final Results of Antidumping Duty Administrative Reviews: Portable Electric Typewrit-*

ers From Japan, 56 Fed.Reg. 56,393 (Nov. 4, 1991). The issue is whether a final decision of this court has effect in the face of the administrative inaction.

I

The plaintiff is an exporter of portable electric typewriters which are or have been subject to an antidumping-duty order published at 45 Fed.Reg. 30,618 (May 9, 1980). Since then, technology has transformed the covered merchandise from electromechanical into electronic, thereby engendering protracted litigation as to the scope of the original order and administrative reviews thereof. Those proceedings led to determinations by the ITA that the electronic machines are within the order's ambit[1] and also that those possessed of electronic calculators[2] and/or text memories[3] are covered as well. Those determinations, in turn, led the petitioner-plaintiff Smith Corona Corporation to elect to abandon the remainder of its court complaint about the other results of an administrative review of the antidumping-duty order published at 52 Fed.Reg. 1,504 (Jan. 14, 1987) and thus to move for entry of final judgment on the scope issues. That motion was granted *sub nom. Smith Corona Corporation v. United States*, 13 CIT 96, 706 F.Supp. 908 (1989). Accompanying the plaintiff's motion were proposed forms of an order and of an injunction, each of which decreed that the U.S. Customs Service "suspend liquidation of all entries of Japanese portable electric typewriters incorporating text memory or calculating mechanisms [devices]".

Not only did the exporters and importers of that merchandise, including the plaintiff herein, appear in opposition to issuance of such a decree, three had already noticed "protective" appeals prior to entry of the final, appealable judgment. *See id.*, 13 CIT at 98–99 and n. 2, 706 F.Supp. at 910–11 and n. 2. On their part, counsel for the defendant recommended against an appeal by the ITA, but they also indicated an unwillingness to recommend that the agency ordain a suspension of liquidation pending the outcome of any other appeal(s) to the Federal Circuit.

The Trade Agreements Act of 1979, as amended, provides in regard to ITA determinations of the kind at issue in the Smith Corona case[4] that the

> Court of International Trade may enjoin the liquidation of some or all entries of merchandise covered by [them] * * * upon a request by an interested party for such relief and a proper showing that the requested relief should be granted under the circumstances.

19 U.S.C. § 1516a(c)(2).

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[1] *See Portable Electronic Typewriters From Japan; Final Results of Administrative Review of Antidumping Duty Order*, 48 Fed.Reg. 7,768, 7,769–70 (Feb. 24, 1983).

[2] *See Final Results of Revised Scope Determination for Antidumping Duty Order on Portable Electric Typewriters from Japan Pursuant to Court Remand* (March 18, 1988).

[3] *See Final Results of Revised Scope Determination for Antidumping Duty Order on Portable Electric Typewriters from Japan Pursuant to Court Remand* (Nov. 23, 1988).

[4] *See* 19 U.S.C. § 1516a(a)(2)(B)(vi).

Notwithstanding the final judgment in favor of Smith Corona as to scope, this court concluded that the record developed did not reflect the requisite "proper showing" for an injunction. *See* 13 CIT at 101–02, 706 F.Supp. at 912–13. Moreover, the court concluded that, while it

> may fashion [a] judgment in such a manner as to assure its enforcement[,] * * * no judgment can extend further than justice requires, and justice does not obligate the ITA to direct the Customs Service now to suspend liquidation * * *.

13 CIT at 100–01, 706 F.Supp. at 912–13. The conclusion was based upon the following analysis:

> * * * [T]he provision for imposition of antidumping duties if the administering authority determines that a class or kind of foreign merchandise is being sold in the United States at less than fair value, 19 U.S.C. § 1673 (1984), is silent on the subject of suspension of liquidation. Rather, under the statute now in effect suspension is mandated after either a preliminary or a final affirmative determination of the ITA of sales at less than fair value of the merchandise which is the subject of its investigation. *See* 19 U.S.C. § 1673b(d) and § 1673d(c)(1)(B). Neither such affirmative determination as to the typewriters in question has been made by the administering authority.
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> * * * * * * *
>
> Indeed, the plaintiff may have lost sight of the fact that the [review] which is the foundation of this case focused on PETs imported during the period May 1, 1981 through April 30, 1982, a time when the record shows that the typewriters covered by the scope issues did not exist – and therefore could hardly have been subject to liquidation after entry then.

13 CIT at 101, 706 F.Supp. at 912, quoting from *Smith Corona Corporation v. United States,* 11 CIT 954, 964, 678 F.Supp. 285, 293 (1987). The conclusion was also reached in recognition of the statutory mandate governing the ITA in the aftermath of a case like *Smith Corona,* to wit:

> **(e) Liquidation in accordance with final decision**
>
> If the cause of action is sustained in whole or in part by a decision of the United States Court of International Trade or of the United States Court of Appeals for the Federal Circuit –
>
> (1) entries of merchandise of the character covered by the published determination of the Secretary, the administering authority, or the Commission, which is entered, or withdrawn from warehouse, for consumption after the date of publication in the Federal Register by the Secretary or the administering authority of a notice of the court decision, and
>
> (2) entries, the liquidation of which was enjoined under subsection (c)(2) of this section,
>
> shall be liquidated in accordance with the final court decision in the action. *Such notice of the court decision shall be published within ten days from the date of the issuance of the court decision.*

19 U.S.C. § 1516a(e) (emphasis added). A similar provision requiring publication in the Federal Register within ten days from the date of issuance of a decision of this court *or* of the Federal Circuit "not in harmony with" the ITA is found in subsection (c)(1) of section 15161. The ITA failed to carry out this mandate, which, on its face, is executory. Nonetheless, in its decision on the appeals of the other parties, the Federal Circuit states, erroneously, that this court "withheld publication of notice of its decision". *Smith Corona Corporation v. United States,* 915 F.2d 683, 688 (1990). Perhaps this was due to misrepresentation(s) by one or more of the appellants. For example, plaintiff's current complaint alleges, incorrectly, in paragraph 7 that "this court held * * * that the ITA was not required to publish a notice of the adverse court decision until judicial review, including appellate review, was completed", while its current reply memorandum argues, again in error, that this court "*upheld* the Department's refusal to publish the Federal Register notice".[5] Publication, which is exclusively the government's obligation under the foregoing sections of the Trade Agreements Act, was not an issue for the court. Rather, the question was suspension of liquidation of entries of merchandise not yet in existence during the period of administrative review which was the jurisdictional underpinning of the case and in the absence of a proper showing for the extraordinary relief which is a preliminary injunction. Furthermore, this court has yet to issue a decision not intended to be obeyed in accordance with law upon filing.

In any event, the opinion of the court of appeals attempted to clarify the matter as follows:

> Liquidation of goods is provided for in 19 U.S.C. § 1516a(c)(1), which requires prompt publication of notice of the court's decision * * *. This provision makes clear that the decision of the Court of International Trade, or of the Federal Circuit, is of controlling effect when rendered, and that each such decision must be published within ten days after its issuance. In *Timken v. United States,* 893 F.2d 337 (Fed.Cir. 1990) we held that § 1516a(c)(1) requires publication of notice of a contrary decision of the Court of International Trade, and requires suspension of liquidation upon publication of the notice. *Id.* at 340.
>
> Such suspension is not automatically lifted when the decision of the Court of International Trade is appealed to the Federal Circuit. Suspension of liquidation continues until a "conclusive" court decision is reached, *i.e.*, a decision that is not subject to further appeal or collateral attack. 19 U.S.C. § 1516a(e); *Timken,* 893 F.2d at 339.
>
> The February 3, 1989 decision of the Court of International Trade was a decision within the scope and meaning of § 1516a(c)(1). Notice of the Court of International Trade decision should have been published within ten days thereafter, and liquidation should have been suspended.

Id., 915 F.2d at 688

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[5] Plaintiff's Memorandum in Reply to Defendant's and Defendant-Intervenor's Opposition to Plaintiff's Motion for Judgment on the Agency Record [hereinafter referred to as "Plaintiff's Reply Memorandum"], p. 11 (emphasis in original).

II

Comes now the plaintiff, alleging in its complaint here in that on April 5, 1990, or prior to the foregoing decision of the Federal Circuit, the ITA did indeed publish notice in the Federal Register of this court's final judgment of February 3, 1989[6] – in the light of the intervening, apposite opinion in *Timken Company v. United States,* 893 F.2d 337 (Fed.Cir. 1990). The complaint continues:

> 16. Exports by Nakajima of portable electric typewriters with text-memory from Japan that were entered on or after February 3, 1989, and before April 5, 1990, and were unliquidated as of April 5, 1990, were subject to the ITA's order of suspension of liquidation under the terms of the ITA's April 5, 1990 notice. These shipments were thereafter reviewed in the context of the ITA's review proceeding for the 1988–1990 review period and antidumping duties calculated for these shipments. These entries were not subject to any form of injunctive relief enjoining liquidation pending judicial review of the ITA scope ruling of January 14, 1987.
>
> 17. Over Nakajima's objection, the ITA held in its notice of final results of the administrative review for the 1988–90 review period that its April 5, 1990 notice of suspension could be applied retroactively to imports entered before the notice was published.

The plaintiff has interposed a motion for judgment on the agency record to the effect that

> this matter be remanded to the Department of Commerce to revise its final results determination for the 1988–1990 administrative review period by excluding from the scope of review of the antidumping duty order on Portable Electric Typewriters from Japan the automatic typewriters exported by plaintiff and entered on or before April 5, 1990, and providing that such merchandise shall be liquidated without assessment of antidumping duties;

to quote from the proposed form of order submitted with the motion.

Plaintiff's complaint fairly characterizes the lie of this action.[7] The report of the ITA's final results shows that the years reviewed were May 1 to April 30 of 1988–89 and of 1989–90. Margins of 0.90 and 3.87 percent are reported for Nakajima for those years, respectively. *See* 56 Fed.Reg. at 56,400. With regard to the issue now joined, the agency's report states:

> SCOPE OF THE REVIEW
>
> In accordance with the Court of International Trade's * * * decision in *Smith Corona Corp. v. United States,* 706 F.Supp. 908 (CIT 1988) aff'd 915 F.2d 683 (Fed.Cir. 1990) that portable automatic typewriters ("PATs") and PETs with a calculating mechanism are within the scope of the order, on April 5, 1990, the Department published in the Federal Register: Portable Electric Typewriters;

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[6] *See* 55 Fed.Reg. 12,701.

[7] The intervenor-defendant argues that the plaintiff should have instituted judicial review within 30 days of the mailing of the ITAs determination to publish notice on April 5, 1990 of this court's final judgment and that jurisdiction over this later-commenced action is now lacking. However, as quoted in the text *infra,* that determination is of critical moment to the November 4, 1991 final results timely challenged herein. Hence, jurisdiction properly exists pursuant to 19 U.S.C. § 1515a(a)(2)(A)(i)(I), (B)(iii) and 28 U.S.C. § 1581(c).

> Court of International Trade Decision Concerning the Scope of the Antidumping Duty Order (55 FR 12701) * * *, a notice suspending liquidation of all unliquidated entries of PATs and PETs incorporating a calculating mechanism, entered, or withdrawn from warehouse, for consumption on or after February 3, 1989, the date of the CIT decision. On September 26, 1990, the Court of Appeals for the Federal Circuit * * * affirmed the CIT's decision and established conclusively that PATs and PETs with a calculating mechanism are within the scope of the antidumping duty order on PETs from Japan. See, Portable Electric Typewriters from Japan; Court of Appeals for the Federal Circuit Decision Concerning the Scope of the Antidumping Duty Order (55 FR 42423, October 19, 1990). Therefore, beginning February 3, 1989, these reviews Cover PETs, PATs, and PETs incorporating a calculating mechanism.

56 Fed.Reg. at 56,393–94. And the ITA concludes that it "will instruct the Customs Service to assess antidumping duties on all appropriate entries."[8]

A

The written arguments of counsel submitted in support of (and in opposition to) plaintiff's motion are so well presented they have obviated any need for additional, oral argument. But they have not obviated listing of the fundamentals at bar:

First, plaintiff's attempt to cast this action as one to foreclose "retroactive application of a court decision"[9] is off base. By way of comparison, as long ago as December 31, 1987 this court opined that the administrative record did not support exclusion of plaintiff's merchandise from the ambit of the 1980 order[10], yet no one is now demanding that liquidation of entries since that date entail antidumping duties. While the gravamen of that opinion remains the law, to make such a demand would, of course, give rise to genuine concerns regarding retroactive enforcement.

Secondly, according to the record, following that opinion's deference to the ITA the plaintiff appears to have had a full and fair opportunity to convince the agency during the remand proceedings and then this court anew during subsequent judicial review of its continuing position on the merits. Only after it had failed to do so did a final adverse judgment enter. That the plaintiff availed itself of the right to appeal further to the Federal Circuit from that judgment hardly supports a complaint now of retroactive enforcement.

Third, if that judgment has been enforceable since its entry on February 3, 1989, all that remains is to carry out its mandate, *nunc pro tunc* prospectively[11].

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[8] 56 Fed.Rec. 1. at 56,400. The court notes in passing that, with the consent of the defendant, a preliminary injunction has been granted, suspending liquidation pending this decision. That injunction lists four entries—on April 25, November 27 and December 9 and 18, 1989.

[9] Plaintiff's Reply Memorandum, p. 14.

[10] *See Smith Corona Corporation v. United States*, 11 CIT 954, 678 F.Supp. 285 (1987).

[11] The plaintiff is on firm ground in pressing for prospective enforcement, which has been and must be the focus of actions involving newly-developed merchandise, but not, as the plaintiff also contends, as of April 5, 1990.

Fourthly, since, as the court of appeals confirmed, that judgment was not merely advisory, the representation that "during the fourteen-month period at issue here, from February 1989 through April 5, 1990, Nakajima was entitled to rely on the Department's original scope determination as the controlling determination applicable to merchandise entered during this period"[12] is wholly unfounded. Just as the government is not at liberty to disregard a court judgment, neither are other parties like the plaintiff.

Fifth, to the extent plaintiff's papers make pretensions of harm, there is no showing of adverse reliance on the court's denial of immediate suspension of liquidation. On the contrary, it was the plaintiff which vigorously, and successfully, opposed Smith Corona's demand therefor.[13]

Finally, to the extent the plaintiff is claiming lack of notice due to the absence of publication in the Federal Register, the actuality of its involvement in the subject for that publication undermines the import of any such claim.

On the other side, the defendant now admits that it was "error" in not having published notice of the final judgment within ten days of February 3, 1989, but it argues that that error was "harmless".[14] In view of the foregoing facts and circumstances, the court concurs. Moreover, as indicated above, the court is not convinced that the lack of prompt publication via the Federal Register renders a decision by it a nullity during the period of administrative inaction. *E.g., Smith Corona Corporation v. United States,* 915 F.2d at 688 ("the decision of the Court of International Trade * * * is of controlling effect when rendered"); H.R. Rep. No. 317, 96th Cong., 1st Sess. 182 (1979) ("merchandise [to] be liquidated in accordance with the administrative decision if entered prior to the first decision of a court which is adverse to that decision").

III

In conclusion, it can be fairly stated that the ITA's failure to administer the Trade Agreements Act of 1979, as amended, in the precise manner Congress intended has not given rise to a claim in this action upon which relief can be granted. As the Supreme Court has frequently articulated, "the 'great principle of public policy, applicable to all governments alike, * * * forbids that the public interests * * * be prejudiced by the negligence of the officers or agents to whose care they are confided.'" *Brock v. Pierce County,* 476 U.S. 253, 260 (1986), quoting *United States v. Nashville, C. & St. Louis R. Co.,* 118 U.S. 120, 125 (1886). Ergo, judgment must be entered, denying plaintiff's motion for judgment on the agency record on its behalf and dismissing the complaint.

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[12] Plaintiff's Reply Memorandum, p. 12.

[13] Indeed, it is plausible that plaintiff's successful opposition resulted in liquidation of entries without imposition of antidumping duties.

[14] Defendant's Memorandum in Opposition to Plaintiff's Motion for Judgment Upon the Administrative Record *passim.*

(Slip Op. 93–215)

GROUP ITALGLASS U.S.A., INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Consolidated Court No. 91–09–00677(BN)
(Court No. 91–05–00369–S (BN))

[Defendant's motion to sever and dismiss and to extend time for answering complaint granted.]

(Dated November 12, 1993)

Appearances:

Soller, Shayne & Horn (Paulsen K. Vandevert, William C. Shayne, and *Margaret H. Sachter,* Esqs.) for plaintiff.

Stuart M. Gerson, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office (*Mark S. Sochaczewsky,* Esq.), Commercial Litigation Branch, Civil Division, United States Department of Justice; *Steven Berke,* Attorney, United States Customs Service, for defendant.

OPINION AND ORDER

INTRODUCTION

NEWMAN, *Senior Judge:* These proceedings on defendant's motion to dismiss for lack of jurisdiction and plaintiff's opposition raise significant issues relating to the court's jurisdiction over actions challenging the denial of protests pursuant to 28 U.S.C. § 1581(a), and to the underlying administrative procedures for protesting decisions of the Customs Service ("Customs"). The issues presented are:

1. May a protest under 19 U.S.C. § 1514 be "filed" with Customs after regular business hours, when no personnel are present at the time, by a telephonic facsimile transmission of a copy, commonly referred to as a "fax"? If so, should the protest be deemed as "filed" on the date and at the time of transmission by plaintiff as recorded by the fax machine, or as of the date and time that the protest is actually received and filed by the appropriate Customs officer?

2. Are duties timely "paid" within the purview of 28 U.S.C. § 2637(a) for purposes of commencing an action within the jurisdiction of the court when a check for payment of duties is sent to Customs via a private express (next day) delivery service concurrently with the filing of a summons, and the check is actually received by Customs the day following the filing of the summons?

Pursuant to CIT Rule 12(b) defendant moves for an order in Court No. 91–05–00369, included in this consolidated action contesting the classification and duty assessment on certain glass containers, severing Protest No. 1001–0–006335, together with the three covered entries (Nos. 017–0914056–8, WO3–2000518–8, and WO3–2011976–5), and dismissing Court No. 91–05–00369 regarding the protest and covered entries for lack of jurisdiction. Defendant predicates its motion on the alleged untimeliness of the protest under 19 U.S.C. § 1514. Similarly, defendant moves to sever Entry No. 017–0913067–6 and to dismiss Court No. 91–05–00369 respecting such entry for lack of jurisdiction on the ground

that plaintiff failed to pay supplemental duties prior to the commencement of this action in contravention of 28 U.S.C. § 2637(a). Defendant also seeks an extension of time for responding to the complaint in Court No. 91–05–00369.

For the reasons that follow, defendant's motion to sever and dismiss is granted as to all the subject entries.

I

As noted above, defendant's motion to dismiss on jurisdictional ground's in Court No. 91–05–00369 relative to Protest No. 1001–0–006335 and the three covered entries is predicated upon the alleged untimeliness of the protest under 19 U.S.C. § 1514. Pursuant to the statute, plaintiff had ninety days from the date of notice of liquidation to file a protest challenging the classification and assessment of duties. If any protest encompassed by this civil action was not filed within the ninety day statutory limit, such protest was filed untimely and the civil action as to such protest and the covered entries must be dismissed for lack of jurisdiction. *See Schering Corp. v. United States,* 67 CCPA 83, 86–88, C.A.D. 1250, 626 F.2d 162 (1980).

Defendant maintains that protest No. 1001–0–006335 against the liquidations of April 20, 1990 was not filed until July 26, 1990, 97 days after the date of notice of liquidation, when the original protest document (C.F. 19) was actually received at the Protest Section of the Customs Service at the World Trade Center in New York, New York, and hence was filed untimely. Plaintiff counters that its protest was timely filed with Customs by fax at 9:25 p.m. at Newark, New Jersey on July 19, 1990, the 90th and final date for filing following the date of the notices of liquidation.

Plaintiff's papers, including counsels' supporting affidavit, establish for purposes of this motion that on October 19, 1990, after 5:00 p.m., when Customs was closed for the transaction of regular business and its personnel had left for the day, plaintiff's counsel made futile efforts to deposit the original protest personally with a security guard at the door of the Customhouse located at the World Trade Center and also with various on-duty Customs enforcement personnel. Concededly, none of the foregoing personnel had any responsibility or authority to accept the filing of protests, and they expressly refused to receive plaintiff's protest.

Counsel for plaintiff thereafter returned to his office on the evening of July 19, 1990 and faxed a copy of the protest to the Fines, Penalties & Forfeitures Division ("FP&F") of the Area Director's office at Newark, and the fax machine recorded that the copy was received on July 19, 1990 at 9:25 p.m. At that point in time, Customs at Newark was closed for the day for the transaction of regular business, its personnel had left, and FP&F was not authorized to accept the filing of protests.

The following morning, July 20, 1990, the faxed copy of plaintiff's protest was apparently discovered by FP&F personnel at Newark, who were at a loss as to what do with the document since that Division was

not the designated place for the filing of protests. Counsel for plaintiff was telephoned by the Newark office and was notified that the faxed document had been received, but should have been filed with the Protest and Residual Liquidations Office at the World Trade Center in New York and would be forwarded.

On July 26, 1990, personnel in the Protest Section at the World Trade Center telephoned plaintiff's counsel to inform counsel that the faxed copy had been received from Customs in Newark, and requested that counsel submit the original protest form (C.F. 19) to the Protest Section for processing. The original protest was thereupon mailed to Customs on the same date.

On November 16, 1990, Customs denied plaintiff's protest as untimely filed, and thereafter Court No. 91–05–00369 was commenced contesting the denial of the protest. Jurisdiction over plaintiff's action is predicated on 28 U.S.C. § 1581(a), and the court is confronted with a threshold issue as to whether the court has jurisdiction respecting the three entries covered by Protest No. 1001–0–006335.

In support of plaintiff's position that the protest was timely filed on July 19, 1990 at 9:25 p.m. when a copy of the protest was transmitted to Customs fax machine in Newark, plaintiff cites *Snake King v. United States,* 18 Cust. Ct. 33, C.D. 1041 (1947) as pivotal to the current issue. In *Snake King,* defendant moved to dismiss on the ground, *inter alia,* that the protest had not been timely filed. The evidence on the motion showed that shortly after 5:00 P.M., on the last day for plaintiff to file a timely protest, the deputy collector at the port of entry received a telephone call from Snake King's attorney to the effect that the latter wished to file a protest. Shortly thereafter, and although the office was officially closed for the day in accordance with the hours prescribed by Customs Regulations, Snake King's attorney appeared at the collector's office, was given access by the deputy collector, and at 5:10 p.m. the deputy collector accepted the protest, dated and time-stamped it.

Based on the foregoing factual scenario, the Snake King court distinguished *Gallagher v. United States,* 1 Ct. Cust. Appls. 69, T.D. 31034 (1910), discussed *infra,* found that the protest had been timely filed by counsel since the deputy collector was still in his office after 5:00 p.m., Snake King's attorney had been voluntarily *admitted to the deputy collector's office* after closing time, the attorney filed the protest *personally* with the deputy collector who accepted the tender of the protest, dated it, and time stamped the protest with the notation that it had been received at "5:10 p.m. with the office having closed at 5 p.m." The court then concluded that "[s]uch presentation and qualified acceptance of the protest was a substantial compliance with section 514 of the Tariff Act of 1930, and the protest is therefore timely." *Id.* at 35–36. The court stressed that, "[w]e distinguish this case, upon the facts here present, from one where a party seeks to file a protest *after the office of the collector has been closed for the day and access thereto has not been possible."* (Emphasis added.)

Although under the particular facts presented, the court found that the Snake King protest had been timely filed, significantly the court pointed out that Customs Regulations fixing the regular business hours of the office of the deputy collector were reasonable, and that Customs had no duty to prolong its hours of business beyond those established by the regulations.

Plaintiff urges that the fax machine at Customs in Newark should be deemed to be Customs' "designated agent" for the filing of protests after business hours; and therefore, the fax machine should be accorded the legal status and authority of an "agent" analogous to the deputy collector of Customs in *Snake King,* and the government's telegraph operator in *McCord v. Commissioner of Internal Revenue,* 123 F. 2d 164 (D.C. Cir. 1941) (where Board of Tax Appeals had instructed Western Union to deliver all messages to the Board over the government telegraph wire, the court held that the government's telegraph operator was the Board's "agent" with whom the taxpayer's petition could be left for filing).

Snake King and McCord are readily distinguishable from the facts here. Plaintiff's attempt to analogize its faxed communication to the personal delivery of a document to an authorized Customs official or to the government's telegraph operator who was specifically authorized by the Board of Tax Appeals to receive the Board's telegraphed communications is without merit. Absent a regulation or directive expressly authorizing facsimile transmission of protests to Customs after regular business hours, the court is not persuaded that the fax machine *per se* accepted plaintiff's protest as "filed," at least in any cognitive or consensual legal sense implicit in the designation of an agent. The protest was transmitted by fax when no personnel were in the office at Newark, and after tender of the protest had been refused, properly, by Customs personnel at the Trade Center having no authority to accept the document. *See Hawaiian Oke & Liquors, Ltd. v. United States,* 28 Cust. Ct. 58, 60–61, C.D. 1388 (1952) and cases cited (it is well settled that the attempted filing of a protest with an unauthorized Customs employee does not constitute a legal filing).

Gallagher v. United States, supra, is an old but still legally sound holding by the Appellate Court that hours of business for Customs established by regulation were "wholly reasonable"; and that the collector's personnel who happened to still be in the office after business hours had no legal duty to accept a warehouse withdrawal and could refuse a tender. *Cf. Hilker & Bletsch Co. v. United States,* 210 F.2d 847 (7th Cir. 1954).

In point of fact, this case is precisely the same as the situation that the *Snake King* court specifically pointed up to be distinguishable, where a party seeks to file a protest after regular business hours, and access to the Customs office is not possible because the office is locked and the personnel have left for the day. In short, *Snake King* simply stands for the proposition that if within the statutory period for filing, a protest is personally tendered to an authorized Customs official in his office after

regular business hours, and the latter is willing to receive and accept the after-hours filing of the protest, it will be deemed as timely filed. On the other hand, "depositing a protest, after regular office hours, with an employee not authorized to handle such matters, will not constitute proper filing thereof." *Hawaiian Oke,* 28 Cust. Ct. at 61, citing *Gallagher.*[1]

Citing *McCord v. Commissioner, supra,* plaintiff's position is, essentially, that 19 U.S.C. § 1514, which prescribes a period of ninety days from the date of notice of liquidation within which to file a protest, requires that Customs provide the *full* ninety day period and hence must remain open for the filing of protests until 12:00 midnight. The court cannot agree that McCord imposes any such burden on Customs. In *McCord,* the taxpayer's petition was received by the government's telegraph operator (who the court held was the "agent" of the Board of Tax Appeals for purpose of receiving petitions for filing) shortly after the Board's 4:30 p.m. closing time established by its rules, but during the regular office hours of the government's telegraph office (open until 6:00 p.m.). Any suggestion in *McCord* that the Board was required to remain open until 12:00 midnight for the filing of petitions was mere dictum.

In any event, *Gallagher,* a decision of our own Court of Appeals having of course precedential effect in this court, approved of Customs regulations establishing reasonable hours of business and held those hours could be a time bar to after-business-hours transactions on the last day of the prescribed filing period. Clearly, if as in the instant case, where there were in fact no Customs personnel remaining in the Newark office at 9:25 p.m. of the 90th day to accept the filing of a protest, plaintiff's argument that after regular business hours a fax machine became Customs "designated agent" and "accepted" the filing of the protest by recording the date and time of transmission, is rejected. The fact that the fax machine was left on to receive communications in the evening did not signify Customs' designation of an agent or acceptance of a protest as "filed" after business hours. Hence, under the circumstances of this case, the document transmitted by fax after business hours, although date and time stamped, has no greater status as a "filed" protest than if plaintiff's counsel, instead of faxing the document, had simply slipped it under the door or into a mail slot, where it might be found the next morning. *See Lewis-Hall Iron Works v. Blair. Commissioner of Internal Revenue,* 23 F.2d 972 (D.C. Cir. 1928), *cert. denied,* 277 U.S. 592 (1928) ("it is well established that in general, a paper is not 'filed' within the contemplation of the law until it is delivered to the proper officer to be filed by him").

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[1] 19 C.F.R. § 101.6 states that "[e]xcept as specified in paragraphs (a) through (g) of this section, each Customs office shall be open for the transaction of general Customs business between the hours of 8:30 a.m. and 5 p.m. on all days of the year. Moreover, 19 C.F.R. § 174.12(f) states that "[t]he date on which a protest is received by the Customs officer with whom it is required to be filed shall be deemed the date on which it is filed." Plaintiff admits that the Fines, Penalties and Forfeitures employee was at a loss as to what to do with the faxed copy of the protest. Pl. Br. at 2. Thus, it appears that plaintiff's counsel failed to even fax the copy to "the Customs officer with whom it is required to be filed."

Finally, it cannot be disputed that filing of certain papers by fax is an acceptable practice at the administrative level and in the courts under limited circumstances. Despite widespread and increasing use of telephonic facsimile communications technology in industry, courts have either shunned the filing or service of papers by fax or have restricted the use of fax to situations where the parties consent or to other limited specified circumstances. *See Salley v. Board of Governors, University of North Carolina,* 136 F.R.D. 417 (M.D.N.C. 1991); CIT Rule 5, Practice Note 1; CAFC Rule 26.

Plaintiff has called to the court's attention the fact that Customs recently issued a directive permitting protests to be filed by fax *during business hours.* The Directive, _____3.A.1.c, states: "Protests, petitions received by facsimile transmission should be accepted and date stamped *by the close of business on the date of receipt."* (Emphasis added.) The foregoing directive concededly was not in effect when the subject protest was faxed to Customs, and plainly does not authorize an after-business-hours transmission of a protest to Customs to be dated as "filed" as of the date of transmission. Plaintiff proposes that Customs should permit protests to be transmitted to it by fax after regular business hours (until 12:00 midnight), processed in the regular course of business the following business day, and dated and time stamped as filed as of the date and time of transmission recorded by the fax machine *(i.e.,* the previous day). The foregoing suggested modification of the directive is a matter properly addressed to Customs, not to the court. Clearly the judicial fiat sought by plaintiff mandating that Customs accept protests as "filed" when transmitted by fax after the close of regular business hours would, if granted, be a wholly unwarranted intrusion into an area of legitimate administrative discretion, concerns and convenience.

II

Turning now to defendant's motion to dismiss on jurisdictional grounds with respect to Entry No. 017–0913067–6, defendant relies on 28 U.S.C. § 2637(a), which provides: "A civil action contesting the denial of a protest * * * may be commenced * * * only if all liquidated duties * * * *have been paid* at the time the action is commenced * * *."

Citing *Nature's Farm Products, Inc. v. United States,* 819 F. 2d 1127 (Fed. Cir. 1987), *aff'g* 10 CIT 676, 648 F. Supp. 6 (1986), defendant insists that the payments required by the above statute must be *received* by Customs *prior to commencement of an action* under 19 U.S.C. § 1515 contesting the denial of a protest, and not merely sent in the mail. *Nature's Farm* is dispositive of the issue.

There is no dispute that on May 15, 1991, the date that the summons was filed in Court No. 91–05–00369, plaintiff sent by Federal Express, a private express delivery service unaffiliated with the United States Postal Service, for next day delivery, a check for the supplemental duties owing in Entry No. 017–0913067–6 to the National Finance Center in Indianapolis, Indiana. The check was in fact received at the Center the day following commencement of the action.

Plaintiff contends that for purposes of § 2637(a), the supplemental duties owing in Entry No. 017–0913067–6 should be deemed to have been paid on May 15, 1991, the date the check was sent by Federal Express to the National Finance Center, and the date plaintiff's summons was filed in Court No. 91–05–00369. Moreover, plaintiff requests that the court "review" *(viz.,* overrule) the Federal Circuit's decision in *Nature's Farm,* and apply its own "mail-box" rule under CIT Rule 5(g).

Under CIT Rule 5(g), pleadings and papers sent to the court by certified or registered mail, return receipt requested, are deemed filed or served as of date of mailing. Notwithstanding that in *Nature's Farm* this court (Aquilino, J.) flatly held that Rule 5(g) has no relevance to payment of duties *(see Nature's Farm,* 10 CIT at 678), and that in any event, plaintiff admittedly did not even utilize registered or certified mailing as required by the "mail-box" rule, plaintiff baldly contends that the court should deem its supplemental duties as paid on May 15, 1990 under the mail-box rule. The short of the matter is that the court lacks jurisdiction in Court No. 91–05–00369 with respect to Entry No. 017–0913067–6, since plaintiff failed to pay the increased duties owed until the day after the summons was filed with the court.

In conformance with the foregoing, it is hereby ORDERED:

1. Defendant's motion to sever and dismiss for lack of jurisdiction in Court No. 91–05–00369, included in this consolidated action, is granted with respect to Protest No. 1001–0–00633–5, together with the three entries covered by the latter protest (Entry Nos. 017–0914056–8, WO3–2000518–8, and WO3–2011976–5) and also with respect to Entry No. 017–0913067–6.

2. The above protest and entries shall be severed from Court No. 91–05–00369 and this consolidated action, designated as Court No. 91–05–00369–S, and such severed action shall be dismissed for lack of jurisdiction. A separate judgment of severance and dismissal will be entered accordingly.

3. Defendant shall file its answer to the complaint in Court No. 91–05–00369 regarding the remainder of that action within ten days of the entry of this order.

4. Plaintiff's request for oral argument is denied since defendant's grounds for dismissal are completely sound, while plaintiff's opposition arguments are very insubstantial, if not totally frivolous.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C93/138 11/9/93 DiCarlo, J.	Canfor, Ltd.	89–10–00567	245.30 9%	245.90 Free of duty	Arthur J. Humphreys, Inc. *v.* United States, 973 F.2d 1554 (Fed Cir. 1992)	Blaine, WA Hardboard wall panelling

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Slip Opinions

Abstracted Decisions

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